Supreme Court of the United States

OCTOBER TERM, 1943

No.———

FOY O. WILEMON AND AMOS E. WILEMON, Doing Business Under the Trade Name of GOOD LUCK OIL COMPANY, A Partnership,

Petitioners,

VS.

PRENTISS M. BROWN, Administrator, Office of Price Administration, et al, (CHESTER BOWLES, Substituted as Party Appellant in the Place and Stead of PRENTISS M. BROWN),

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

In support of their petition for writ of certiorari, the Petitioners respectfully show to the Court:

1.

Opinions of the Courts Below

The opinion of the District Court of the United States is reported in 51 Fed. Supp. 978, and appears in the Record at pages 99 to 106 and the appendix hereto. The opinion of the United States Circuit Court of Appeals has not been reported, but appears at page 116 of the Record and in the appendix hereto.

2.

Jurisdiction

(a) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was handed down January 13, 1944; petition for rehearing was denied March 3, 1944.

(b) This Court has jurisdiction under Title 28, U. S. C. A. Section 347a, and under paragraph 5(b) of Rule 38 of the Court Rules of the Supreme Court of the United States.

(c) The jurisdiction of this Court is invoked upon the following grounds:

(1) In holding that Congress intended to and did delegate to the Office of Price Administration power and authority to promulgate and enforce administrative suspensions which amount to penalties fixed for past violations, the United States Circuit Court of Appeals for the

Fifth Circuit decided an important question of federal law in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decisions in *Adkins vs. Childrens Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394; *Panama Refining Co. vs. Ryan*, 293 U. S. 386, 79 L. Ed. 446; *Schecter vs. U. S.*, 295 U. S. 494, 79 L. Ed. 1570; *Wallace vs. Cutten*, 298 U. S. 229, 80 L. Ed. 1157; *U. S. vs. La France*, 282 U. S. 567, 75 L. Ed. 551; and *O'Sullivan vs. Felix*, 233 U. S. 318, 58 L. Ed. 980.

(2) The Congress of the United States provided in subdivision (a) of Section 925, Title 50, U. S. C. A. (the enforcement provision of the law here in question): "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904, Title 50, U. S. C. A.) he may make application to the appropriate court for an order enjoining such acts or practices * * *". Both the Hearing Commission and the United States District Judge found that Petitioners had not wilfully violated any provision of Ration Order 5c, and there was no evidence of any continued violation or attempts to continue to violate any of such orders. The above quoted Act clearly gives the United States District Courts jurisdiction of proceedings thereunder. Petitioners' complaint to enjoin the enforcement of the penalty of suspension administratively fixed by the Office of Price Administra-

tion clearly presented all equitable features to the trial court. The Hearing Commissioner held and the trial court found in its opinion (R. 100) that the violation for which the administrative suspension was assessed was an isolated one and was not a wilful violation, and when the United States Circuit Court of Appeals reversed and remanded this cause to the trial court with direction to dismiss the injunction, it decided an important question of federal law in a way to conflict with the applicable decisions of the Supreme Court, and particularly in conflict with *Hecht Company vs. Bowles*, 88 L. Ed., 465, reported in Advance Sheet No. 9 of Vol. 88 L. Ed., recently decided by this Honorable Court.

(3) The United States Circuit Court of Appeals decided an important question of federal law in this cause which has not been, but should be, settled by the Supreme Court.

STATEMENT OF THE CASE

Proceedings Below

Foy O. and Amos E. Wilemon, doing Business under the trade name of Good Luck Oil Company, a partnership, own and operate a chain of seven retail gasoline filling stations in the City of Dallas, Texas, and they also own the real estate on prominent business corners of the City of Dallas, upon which they have erected magnificent structures and equipment to house their business. Their

sales of gasoline and other petroleum products, together with their repair and accessory business, amounts to more than $1,000,000 per year. Exclusive of their good will and trade name which they have built up over a period of more than twelve years, they have an investment of well in excess of a million dollars. (R. 3).

On May 1st, 1943, they were served with an "order" by Talbot Smith, Regional Attorney of the Office of Price Administration, Region V, commanding them to appear before Israel Treman, "Hearing Commissioner", on May 7th, 1943, to show cause why they should not be suspended from further engaging in and carrying on their business for such time as the "Hearing Commissioner" might deem proper, for having violated certain provisions of Ration Order 5C. (R. 14-16). The "Charges" against them were, (1) On or about April 8th, 1943, they, as a licensed distributor, and accountable for all gasoline coupons and other evidences received by them, did not have in their possession or control. coupons or other evidences in gallonage value, which, when added to the gallonage represented by exchange certificates which had been transmitted to the State Motor Fuel Tax Administrator, a total of all coupons or other evidence deposited in their ration bank account, equivalent in gallonage value to the number of gallons which they had transferred at said time. (R. 15)

(Note: That Petitioners had sold more gasoline than they had ration coupons to show for.)

(2), On April 8th, 1943, they had in their possession about 1,063 No. 6 Class A Ration Coupons, which they had accepted in exchange for gasoline prior to the effective date of said No. 6, Class A Ration Coupons.

(3), They had in their possession coupons issued as a ration, or part of a ration book, to which they were not entitled, and which they had not acquired in accordance with the provisions of Ration Order 5C. (R. 15).

(Note: Charges (2) and (3) constitute the same transaction, but is charged twice in different language).

(4), They accepted coupons in exchange for gasoline on or about April 8th, 1943, upon which there had not been then and there clearly written, on the reverse side of each such coupon by the person to whom it was issued, the information required in Ration Order 5C. (R. 15).

(Note: That Petitioners did not make the purchasers of gasoline write the License number and state of registration of their motor vehicle on the back of the coupon.)

The hearing before the "Hearing Commissioner" was passed from May 7th, 1943, until May 17th, 1943, at which time Petitioners appeared in "obedience" to the "order" of the Regional Attorney, and after the completion of the hearing, at which they proved to the satisfaction of the "Hearing Commissioner" (R. 98-99) they were not guilty of any of the charges, but admitted that they had received the Class A No. 6 coupons alleged prior to their

effective dates, but had done so on the advice of the Dallas County Rationing Board (Bettie Wolfe R. 62-77) that they could accept the coupons in advance of their due date and hold them until such date as they would become due, if they had enough gasoline on hand so to do, and then turn them in.

After having announced at the hearing in an oral opinion (R. 98-99) that he had absolved Petitioners from all charges save and except that they had accepted the 1,063 No. 6 Class A Coupons prior to their effective date, and further announced that he "was willing to concede they had accepted these coupons in good faith, but they were guilty of gross negligence in not reading and informing themselves of the rules and regulation issued", the "Hearinf Commissioner" on May 25th, 1943, issued his "order" suspending Petitioners "from selling, transferring, or dealing in gasoline for a period of two (2) weeks, commencing at 12.01 A. M., June 14, 1943, and ending at 12.01 A. M., July 1, 1943. (R. 18).

From this order of the "Hearing Commissioner", Petitioners timely filed their petition for review to the "Hearing Administrator at Washington, D. C., in accordance with Procedural Regulation No. 4, and on July 20th, 1943, Gerome Walsh, "Acting Deputy Hearing Administrator", affirmed the order and judgment of the "Hearing Commissioner" and re-fixed the date of suspension, and adding a couple of days, from 12.01 A. M. August 8, 1943 to 12.01 A. M. August 25, 1943. (R. 18-22).

August 7th, 1943, Petitioners after so exhausting their administrative remedies, filed their petition in the District Court of the United States for the Northern District of Texas, seeking to restrain the enforcement of this penalty, alleging such penalty was in violation of Articles I and II and Amendments V and X to the Constitution of the United States, and such penalty involved was of more than the value of Three Thousand Dollars. (R. 1-9). By agreement the enforcement of the penalty was stayed pending the final disposition of the suit, (R. 8), making it unnecessary to seek temporary restraining order and injunction.

The cause was tried on its merits, September 27th, 1943, and on September 29th, 1943, the Honorable William H. Atwell, United States District Judge, delivered and filed his written opinion, sustaining the position of Petitioners, (R. 99-106), and, in accordance with said Opinion, Final Judgment, permanently restraining the Office of Price Administration from enforcing this penalty was entered October 2nd, 1943. (R. 107).

The Office of Price Administration, Appellants below, on October 18, 1943 (R. 108, 110) duly filed their notices of appeal. The case was submitted by briefs and oral arguments on December 13, 1943, and on January 13, 1944, the United States Circuit Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District

Court of the United States for the Northern District of Texas with directions to dismiss the injunction (R. 116), and judgment was entered accordingly (R. 122).

On February 3, 1944, and within the time allowed, Petitioners filed their motion and brief for rehearing, which was by the Court on March 3, 1944, denied without written opinion (R. 158). On March 8, 1944, upon application by Petitioners (R. 159), mandate was stayed for a period of thirty days (R. 162) pending this petition for certiorari.

Findings Below

HEARING ADMINISTRATOR: That the offense for which Petitioners' business was suspended was not a wilful violation, but one of such gross negligence as to warrant a severe penalty (R. 21).

THE TRIAL COURT: "The Congress did not vest in the defendants such a power as here exhibited. If it did, it presumed to act improperly, which presumption will be indulged. We must find that it acted constitutionally, if possible, and lay the blame where it belongs, to-wit, on the Board."

"Upon the trial, the facts were stipulated. This stipulation fixed their (Petitioners') damages at approximately $10,000,00. Testimony accompanying the stipulation shows that a Mrs. Wolfe, an employee of the plaintiff (Petitioners), telephoned the O. P. A. Dallas office and asked

about coupons that had been improvidently taken before they were valid. She claims that a woman, who answered the phone, told her that she could hold the coupons and turn them in to the refinery after they became valid."

"The authority of an employee in the O. P. A. office to make such a statement is denied by the superintendent. It must be assumed, however, that something of this sort transpired, because the 'Hearing Administrator' declared that the holding and taking of the coupons was not wilful. The record also discloses that in the early days of allocation that procedure may have been indulged in by some dealers." (R. 100, 101).

CIRCUIT COURT OF APPEALS: "It is true that the Office of Price Administration, like many other administrative boards and commissions, has put forth a great mass of regulations which look like legislation and has established an elaborate system of quasi courts. It is said thus to have established an *imperium in imperio*, and this has provoked adverse public comment." (R. 120).

Statutes & Orders in Question

The Office of Price Administration claimed that authority to issue the orders and directives here complained of and hereinafter set out was given them by Section 2(a) of Acts of June 28, 1940, 54 Stat. 676, as amended by Act May 31, 1941, 55 Stat. 236, entitled "Priorities and Allocations Act", and by Title 3 of the Second War

Powers Act 1942, March 27, 56 Stat. 176, 50 U. S. C. A. Appendix 636. Claiming the above provisions of Congress as their authority, the Office of Price Administration issued Ration Order 5c, labelled "Mileage Rationing; Gasoline Regulations" (7 F. R. 9798), which provides, among other things: "Any person who violates this Ration Order No. 5c, may by administrative suspension order, be prohibited from receiving any transfers or deliveries of or selling or using or otherwise disposing of, any gasoline or other rationed product or facilities. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

Pursuant to the power which they claimed was delegated to them by the above mentioned statutes, the Administrator of the Office of Price Administration issued General Order No. 46, creating the office of "Hearing Administration", which provided for the appointment by the Administrator of a "Hearing Administrator" and numerous "Hearing Commissioners", the Hearing Commissioners to hear complaints brought by the Office of Price Administration and, by administrative order, suspend businesses of those engaged in the handling of rationed products for any period of time his judgment dictated, and the only remedy open to one so suspended was an appeal to the Hearing Administrator.

On February 6, 1943, the Administrator issued Procedural Regulation No. 4, effective March 1, 1943, which provided for a hearing before a Hearing Administrator and for suspension decrees, 8 F. R. 1744, 2035. This order constitutes their "Judicial Code."

Specification of Errors

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 116) and its judgment based upon such opinion (R. 122) are erroneous, in that:

1. Congress, by the passage of Section 2(a), Acts of June 28, 1940, 54 Stat. 676, as amended by Act May 31, 1941, 55 Stat. 236, entitled "Priorities and Allocations Act", and by Title 3 of the Second War Powers Act, 1942, March 27, 56 Stat. 176, 50 U. S. C. A. Appendix 636, did not delegate to the Office of Price Administration or to any one else power to administratively suspend the business of your Petitioners.

2. If Congress did so delegate such power, it acted in violation of Articles I and II of and Amendments 5 and 10 to the Constitution of the United States.

3. The trial court having found, with adequate evidence to support such finding, that Petitioners had not violated any provisions of Ration Order 5c, and within its discretion having restrained the enforcement of the penalty assessed, the United States Circuit Court of Appeals may not set aside such restraining order where the

abuse of the discretion of the trial court is neither pleaded nor proved, even if Congress, within its constitutional limitations, has delegated to the Office of Price Administration the powers claimed by them.

Brief of the Argument under Question 1, Germane to Specifications of Error 1 and 2

It is presumed, until the contrary is shown, that Congress acted within the scope of its Constitutional authority in the passage of the law here under discussion. If it did it did not intend to grant to the Office of Price Administration power and authority to set up the "Office of Hearing Administration" to act and function as courts in usurpation of the functions of the judiciary with full power and authority to adjudicate and fix penalties. In the first place the judicial powers of the Government is not Congress' to give. That power was fixed in and given to the judiciary by the Constitution as was the legislative power given to Congress. That the "suspension" orders being meted out by the "Office of Hearing Administration" are penalties and not allocations under all the decisions of our Courts, as will be unquestionably shown in a later discussion in this brief is unquestionable. Surely it will be admitted by Appellants that Congress cannot delegate power to executive agencies to fix penalties!

"The legislature cannot delegate to an administrative board the authority to fix the penalty for a violation of orders or regulations which the legislature authorized the

board to make. The penalty must be fixed by the legislature itself. *Howard vs. State* (1922) 154 Ark. 430, 242 S. W. 818 (arguendo); *State vs. Atlantic Coast Line R. Co.* (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. (N.S.) 639. (arguendo); *Zuber vs. Southern R. Co.* (1911) 9 Ga. App. 539, 71 S. E. 937. And see *U.S. vs. Breen* (1889) 40 F. 402, infra, III. m; *Tuttle vs. Wood* (1930) Tex. Civ. App. 35 S. W. (2) 1061.

"As stated in a Georgia case: 'To say that wrongful and neglectful conduct shall be penalized is such a legislative function as cannot be delegated by the legislature. That this is true as to penalties of a criminal nature will not be questioned, and we believe that the same principle applies where a wrong or neglect is penalized by giving the person against whom the wrong or neglect particularly operates the right to recover punitive damages in a civil action. In other words, it is purely a legislative function to authorize the imposition of punitory liability, whether that liability is to be enforced in a civil or criminal action. The legislature may authorize an administrative body or officer to make regulations, and may declare it to be punishable for any person to violate those regulations; but, unless the legislature itself gives its sanction, at least in general terms, to the imposition of punishment, or of civil redress in the nature of punishment, for an act or general class of acts, no merely administrative board can provide for the punishment of that act or class of acts and supply the details of how and when the penalty or punishment shall be imposed.'"

(Anno. Delegation of Legislative Power, following Panama Refining Co. vs. Ryan, 293 U. S. 386, 79 L. Ed. 446 at Page (L. ed.) 491-492).

That Congress knew and abided by this cardinal principle of law is evident, for it provided the penalties for violators of the act and rules and regulations issued thereunder, and conclusively showed that they did not intend for the Office of Price Administrator to "legislate" penalties of its own. Section 925 of Title 50, U. S. C. A., (The enforcement provision of the law here in question), provides:

"(a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904 of this Appendix), he may make application to the appropriate Court for an order enjoining such acts or practices, or for order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

"(b) Any person who wilfully violates any provision of Section 4 of this Act (Section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under Section 2 or 202 (Sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subjected to a fine of not more than $5,000.00, or to imprison-

ment for not more than two years in the case of a violation of Section 4 (c) (Section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

"(c) The district courts shall have jurisdiction of criminal proceedings for violations of Section 4 of this Act (Section 904 of this Appendix), and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act (This Section). Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2) (This Section), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceedings under this Act."

It is inconceivable, in view of such complete pattern of enforcement, that the Office of Price Administration could think Congress left to it, even if it were within the power of Congress to do so, any discretionary powers to fix additional penalties or punishments of its own. The machinery of punishment is so complete, so detailed and so precise that, had it meant that any other penalty or punishment should be meted out, it would have so said.

> "The Secretary of the Treasury cannot, by his regulation, alter or Amend a revenue law, nor put into the body of the Statute a limitation which Congress did not think it necessary to prescribe." Worrell v. Jones, 106 U. S. 267; United States v. Jones, 144 U. S. 591.

The very nature and wording of the Acts unquestionably shows that Congress knew that it, and it alone, could prescribe penalties and punishments for violations of this Act and rules and regulations promulgated hereunder.

In justifying their position in the assumption of the power to issue administrative suspensions the Office of Price Administration urges that Congress knew that the boards had been claiming the power to, and in fact, had been issuing suspension orders against dealers who they claimed had violated the rationing regulations (Senate Report 989, 77th Congress, Second Session) (88 Congress Record, February 24, 1942, page 1634). With this position your Petitioners can not agree.

After it had been brought to the attention of Congress that the Office of Price Administration had assumed and

was exercising such powers, the House of Representatives appointed a committee to investigate such activities on the part of the Office of Price Administration. By House Resolution 102, 78th Congress, 1st Session, the House of Representatives passed the following Resolution:

> "RESOLVED, That a committee of seven Members of the House of Representatives be appointed by the Speaker of the House, which said committee is authorized to conduct investigations of any action, rule, procedure, regulation, order, or directive taken or promulgated by any department or independent agency of the Federal Government where complaint is made to said committee that such action, rule, regulation, procedure, order, or directive—
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> "(1) Is beyond the scope of the power or authority granted to such department or independent agency by Congress or by Executive Order.
>
> "(2) Invades the Constitutional rights, privileges, or immunities of citizens of the United States.
>
> "(3) Inflicts penalties for failure to comply with such rules, regulations, or directives, without affording those accused of violation an opportunity to present their defense before a fair and impartial tribunal.
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> "The said committee shall report to the Congress from time to time the results of such investigations and such recommendations as they see fit with the respect to the personnel of those administering any such department or independent agency, or shall recommend such legislation or amendments to existing legislation as they deem desirable.

"The Committee or any subcommittee thereof, shall have power to hold hearings and to sit and act anywhere within or without the District of Columbia, whether the House is in Session or had adjourned, or is in recess; to require by subpoena or otherwise the attendance of witnesses and the production of books, papers, and documents; to administer oathes; to take testimony; to have printing and binding done; and to make such expenditures as it deems advisable within the amount appropriated therefor. Subpoena shall be issued under the signature of the chairman of the committee and shall be served by any person designated by him. The provisions of Sections 102 to 104, inclusive, of the Revised Statutes shall apply in the case of any failure of any witness to comply with any subpoena or to testify when summoned under authority of this resolution."

Pursuant to that Resolution, the Hon. Sam Rayburn, Speaker of the House, appointed the Honorable Howard W. Smith of Virginia Chairman of the committee, and to serve with him, the Hons. John J. Delaney, Hugh Peterson, Jerry Voorhis, Fred A. Hartley, Jr., John Jennings, Jr., and Clare E. Hoffman. This Committee is known and designated the SELECT COMMITTEE TO INVESTIGATE EXECUTIVE AGENCIES HOUSE OF REPRESENTATIVES, Seventy-Eighth Congress, First Session, and on November 15th, 1943, that Committee made its Second Intermediate Report to the House.

On page 2 of this report, page 42, the Committee said:

"The committee finds that the Office of Price Administration has assumed unauthorized powers to legislate

by regulation and has, by misinterpretation of acts of Congress, set up a Nation-wide system of judical tribunals through which this executive agency judges the actions of American Citizens relative to its own regulations and orders and imposes drastic and unconstitutional penalties upon those citizens, depriving them in certain instances of vital rights and liberties without due process of law. This seizure of judicial and legislative functions of government by the Office of Price Administration is traced in detail in the following pages.

"The committee believes that the facts here presented reveal practices which if not halted might conceivably lead to the undermining of our basic constitutional provisions for separate and independent executive, legislative, and judicial departments of governments."

And again on page 3 of this report, the committee continues:

"Under the Constitution the Government of the United States is divided into three great departments. The separation of powers into legislative, executive, and judicial branches is sound constitutional doctrine in the United States today. It follows that the concentration of all three categories of power into the hands of the executive branch with merely a limited and circumscribed review by the Courts violates basic principle of the Constitution and constitutes a dangerous approach toward totalitarianism.

"No executive agency should have or assume power to enact subordinate legislation in the form of rules, regulations and orders execept within limited and rigidly restricted bounds prescribed by Congress, nor should such agency be permitted to create mock courts to try offenders against such rules or inflict punishments upon such offenders.

"In addition to the statutory court created by the Emergency Price Control Act, your committee has found that the office of Price Administration has developed an unauthorized and illegal judicial system and that through the mass of rules and regulations daily enacted by that agency it has also developed such intricate and involved administrative review machinery that litigants are completely bewildered by the maze of procedure through which they must wander to eventually arrive at a court which will grant them only the crumbs of judicial relief. This situation must be changed and changed immediately."

The office of Price Administration contends that this Act had been back before Congress after the system of "Hearing Administration" suspensions had been put into effect. They say Congress knew about this practice, did nothing about it, and, therefore, sanctioned it. Here is what this Committee has to say about that:

> "Prior to the passage of the Second War powers Act the War Production Board, while having the power to allocate scarce materials for the purpose of speeding the war effort, lacked any power or legal authority

to enforce orders which it issued for that purpose. As a means of enforcement the Board adopted a system of punishing those who violated its orders by depriving them of further access to such materials.

"The imposition of such punishments or penalties is nowhere authorized by any of the statutes pursuant to which the War Production Board operates. Its sole justification for the use of these so-called sanctions is (1) to deny that the sanctions are penalties, and (2) to state that the Congress has not since affirmatively disapproved of this conduct and hence must be considered as having tacitly approved of it. Your committee thinks this is a ridiculous position for any supposedly responsible agency of the Government to take. To make the matter still more ridiculous, the War Production Board attempted to delegate this assumed and illegal power to the Office of Price Administration." (Pages 13-14 Committee Report).

Citing and approving Judge Atwell's opinion in this very case before this Honorable Court, this Committee further said:

"This entire pseudo judiciary has been established without statutory authorization and despite the fact that the statute contains ample enforcement and penal provisions. The Second War Powers Act provides that violations of its provisions or of rules or orders issued pursuant to it shall be enjoined. It provides further for fine and imprisonment of wilful violaters. However, all of these provisions, naturally, require court action and, as has been pointed out, the Office of Price Administration consistently avoids recourse to court wherever possible. When there is a suspected violation of some

rule, regulation, or order, the person suspected is cited to appear before one of the 'Hearing Commissioners'. Upon the day set for hearing evidence is heard and thereafter a decision is rendered by the Hearing Commissioner. From his decision the defendant may appeal and the prosecutor, despite the penal nature of the proceeding, is likewise afforded this right. Such an appeal by the prosecution is closely analogous to the placing of the accused in double jeopardy, and your committee consequently condemns the practice.

"All appeals from decisions of Hearing Commissioners are subsequently reviewed by the Hearing Administrator at Washington. His decision is final and so far as possible recourse to Court is obstructed. An exhaustive brief was prepared in the Office of Price Administration for the purpose of ascertaining methods by which to obstruct in every way possible judicial review of decisions of the Hearing Administrator. Reference is made to the brief of Norma Zarky, found in the office of Thomas I. Emerson, Associate General Counsel in charge of the Enforcement Division of the Office of Price Administration, which covers in minute detail every phase of judicial review with the avowed purpose of limiting access to the courts.

"The establishment of a system of 'courts' within the Office of Price Administration was all that was necessary to make it a complete government, inasmuch as it already exercised executive and legislative powers. The agency recognizes this to be true as may be readily seen from its efforts to achieve a separation of powers along constitutional lines. However, no real separation of powers has been accomplished. The judicial branch does not hesitate to borrow personnel

from the executive to act as 'judge' in the trial of its cases.

"The punishment meted out by the Office of Price Administration to offenders which its 'courts' have found guilty is in many cases most severe. In the case of Toots Shor Restaurant in New York City, charged with consuming more meats than it was allowed, there was an expressed finding by the Hearing Commissioner that there was no element of wilfulness of the violation. The Hearing Commissioner rendered a decision to the effect that the owner of the restaurant could continue to get sufficient points for his normal allotment, but that he must set aside enough points over a 12-month period to take care of the amount which he had theretofore used in excess of said allotment. The enforcement attorneys appealed the case to the Hearing Administrator at Washington and the decision of the Hearing Commissioner was reversed. The Hearing Administrator entered an order depriving the Toots Shor Restaurant from serving or using any meats, fats, or oils (including butter and cooking oils) for a period of approximately 90 days. The testimony in this case showed that the owner had an investment of approximately one quarter of a milion dollars and that the restaurant did a tremendous business. Such an order is calculated to completely drive a person out of business.

"This is not an isolated nor even an extreme case of severity. Many individuals have been effectually put completely out of business for long periods. From March 1st, 1943, to October 1st, 1943, the Office of Price Administration issued a total of 4,062 suspension orders and its 'courts' are daily grinding them out. Suspension orders so issued are often of extreme

duration. The power assumed by the Office of Price Arministration to suspend the rights of individuals to receive rationed commodities enables it by its interpretation to suspend for a period ending December 31st, 1944, and sentences for this period have many times been inflicted.

"Your committee has found that in the New York region alone, during the period of less than 6 months, suspension orders were issued in 12 different cases depriving the persons 'convicted' of receiving rationed commodoties during the life of the Act, to wit: Until December 31st, 1944.

"Such action on the part of the office of Price Administration amounts to the taking of private property without due process of law.

"The harshness of the penalties inflicted by the Office of Price Administration is measured not only by the length of their duration, but also in other ways. Suspension orders directed against retail merchants invariably require the merchants during the period of the suspension to display his 'guilt' to the public at large in the same fashion as convicts in mediaeval times were branded or mutilated for the purpose of drawing public ridicule and contempt. Mimeograph suspension order forms found in the regional offices provides for the posting of printed notices of guilt required to be kept 'posted', plainly visible to the public, at place of business.

"While the courts, of course, protect citizens of this Nation from persecution and oppression insofar as they may, yet your committee urges that the Congress insure by statute that there will be no recurrence of such instances as are herein related." (Committee Report pages 14-17).

Even more significant and indicative of the fact that this Committee thinks Congress never intended for the Office of Price Administration to Establish such "Office of Hearing Administration" and to issue such suspensions will be found in the following portion of the report:

> "In order to avoid the necessity of court action and at the same time gain the unlawful power to suspend indefinitely the right of a person to do business, the Office of Price Administration has hit upon the dubious expedient of writing into its ration orders prohibitions of price violations. Such a prohibition is to be found in General Rations No. 8, which is applicable to all commodities over which the Office of Price Administration has rationing control. Section 2.10 of that order is as follows: 'No person shall, sell or otherwise transfer, and no person shall, in the course of trade or business, buy or receive, any rationed commodity at a price in excess of the applicable maximum price established for that commodity by the Office of Price Administration.'"
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> "Coupled with this prohibition is a clause imposing the criminal penalties of the Second War Powers Act viz.: 'A $10,000.00 fine, one year imprisonment or both, upon offenders, despite the fact that the Emergency Price Control Act specifically fixes the penalty at a $5,000.00 fine, one year imprisonment or both, upon conviction.
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> "Coupled also to General Ration Order 8 is section 4.1 which is as follows: 'Any person who violates a ration order may, by administrative suspension order, be prohibited from receiving any transfer or delivery of, or from selling, using, or otherwise disposing of, any rationed commodity."

By tacking implied provisions of the one law to the other, the Office of Price Administration has thus managed to take unto itself far more judicial power than either of the laws, taken separately, or even read together in their true meaning, could be construed to grant.

"As a matter of actual fact the Office of Price Administration, by so doing, has actually directly violated a congressional prohibition. The Emergency Price Control Bill, as originally introduced, provided for administrative revocation of licenses. The fact that the Congress deleted this provision and substituted in its place a revocation section requiring recourse to court for an order of revocation conclusively shows that Congress did not intend to grant, but intended positively to deny, the power which the Office of Price Administration has assumed.

"The extent to which the licensing provision of the Price Control Act has been ignored and administrative substitute has been used is strikingly revealed by information furnished your committee to the effect that 392 suspension orders had been issued during a 5-month period, based solely upon price violations, while during that same period, and one month beyond, only 10 proceedings for suspension of license had been instituted before the courts as provided by the provisions of the Price Control Act.

"The Office of Price Administration has consistently displayed a tendency, wherever conceivably possible, to avoid recourse to courts of law, even to the extent of stretching the statutes in some cases beyond all reasonable understanding. To combat and checkmate such dangerous trends your committee strongly urges the Congress that it specifically prohibit the

continuation of such assumption of power as herein set out." (Committee Report p. 18-19, p. 73-75 Appendix B).

Appellees contend that the various statutes passed by the Congress under which the Office of Price Administration attempts to set up its system of "courts" are so plain on their faces as to offer no room for doubt. In no conceivable way, we urge, could reasonable men read into them any such authority. It is a well settled principle of law that Congress does not legislate by innuendo, but Appellants so earnestly urge that Congress intended that they should have power to set up what the Committee calls its system of "pseudo" courts we have brought before this Honorable Court what at least one branch of Congress thinks of the system. This a regularly constituted and functioning committee, clothed with all the power possessed by the House of Representatives, and directed to investigate the very thing that is before this Honorable Court. The findings of that Committee are not only astounding, but shocking and amazing to those who have had no experience with them, but commonplace to us who have.

That Congress did not give such opwer to the Office of Price Administration as would allow them to set up the "Office of Hearing Administration" and its kindred corollaries to sit as courts, judge and sentence and to take people's property without due process is unquestionable. That they did not intend so to do is equally as clear.

As to appellant's contention that by remaining silent after it knew about suspension orders being issued by the Office of Price Administration, Congress had approved its acts, we do not agree. On the contrary, the reverse is true. Even if we did not have the report of the Select Committee, supra, we have ample authorities to sustain our position. On this point the courts have said:

> "Congress cannot be estopped by its silence from exercising its Constitutional powers of legislation. Nor does the silence of Congress indicate its approval or disapproval of matters coming to its knowledge in the course of its deliberation." United States vs. Chemical Foundation, 5 F. (2) 191 (Headnote 8 at page 210); affirming some cases below 294 F. 300, affirmed, U. S. vs. Chemical Foundation, 47 S. Ct., 272 U. S. 1, 71 Led. 131.

Under Question 2, Germane to Specifications of Error 1 and 2

Emergency Powers

Never since our Constitution was adopted have we had a great National catastrophe that the reformers did not come forward with their remedies. Each time they come forward with a brand new set of cure-all theories, but always resulting in a concerted attack upon the Fundamental Law of the Land. Each time they plead that they ought to be permitted to do what they seek to do because of "grave emergencies."

Each time they have been told by the courts that "grave emergencies" do not alter the Constitution; that the Constitution was conceived, designed, and adopted in a period of the most "grave emergency" through which this country has ever passed; that the Constitution was so conceived, designed, and adopted as a safeguard and anchor for a great Democratic Government in time of storm as well as in the calm. But they always come back for more.

They now plead that because of the present "grave emergency" this Honorable Court ought not to disturb them in their present state of usurpation of power. Let the courts tell them again.

Upon this point, in *Schechter vs. United States*, 295 U. S., 494, 79 L. Ed. 1570, Mr. Chief Justice Hughes said:

> "First. Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed

> to be adequate, as they have proved to be both in war and peace, but these powers of the National Government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment of, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'," citing also Ex parte Milligan 4 Wall. 2, 120, 121, 18 L. Ed. 281, 295, 296; Home Bldg. & L. Asso. vs. Blaisdell 290 U. S. 398, 426, 78 L. Ed. 413, 422, 54 S. Ct. 231, 88 A. L. R. 1481.

If then the Office of Price Administration has been permitted to set up its system of "Hearing Administration" with power and authority to issue such suspensions as is here before this Honorable Court, that power or necessity was delegated to it by Congress. As we said in the outset we do not believe such was delegated to them, because it is presumed that Congress acted within its Constitutional limitations, and such power as they presume to possess could not be delegated by the Congress. Such delegation of legislative power as they presume would be an unlimited delegation of power to deal with "violators" at will, fix whatever penalties their discretion dictated, in direct violation of Article I, Clause 1 of the Constitution of the United States, and to function under such delegation as a "court" is in direct violation of Article

III of the Constitution of the United States, and any penalty enforced under such system would be violative of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

Article I Section 1 of the Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article III Section 1 of the Constitution provides:

> "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Delegation of Legislative Power

Ration 5C, the terms of which Petitioners are alleged to have violated, provides:

> "Any person who violates this Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving and transfers or deliveries of, or selling or using or otherwise disposing of any gasoline or other rationed product, or facility. Such suspension order shall be issued for such period as in the judgment of the administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

No such powers as these are had by any United States District Judge. No Justice of this Honorable court possesses such authorities as are attempted here to be delegated to the "administrator" or to a "hearing commissioner." The administrator or "hearing commissioner" is the sole judge of guilt. His "judgment" is his only limitation.

Such unlimited delegation of legislative authority has ever been condemned. The exact question, "judgment" of the administrator or executive, was passed upon and condemned by the Supreme Court in *Panama Refining Co. vs. Ryan*, 293 U. S., 386, 79 L. Ed. 446; and in *Schechter vs. United States*, 295 U. S., 494, 79 L. Ed. 1570. In *Panama vs. Ryan*, supra, the Court said: "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute." In *Schechter vs. U. S.*, supra, the Court held that to leave to the President the discretion of setting up "Codes of Fair Competition" was invalid, because Congress left to the "judgment" of the President what "Fair Competition" was. If such functions cannot be left to the President of the United States, can a little "hearing commissioner" be bound only by his "judgment" as to when and for how long he will suspend a citizen, especially ones who have acted in good faith as Petitioners were found to have done?

All delegations of legislative powers to be valid must be within prescribed limits. *Gibson Auto Co. vs. Finnigan*, 259 N. W. 420; *O'Donoghue vs. United States*, 289 U. S. 516, 530, 77 L. Ed. 1356, 1360, 53 S. Ct. 740; *Crowell vs. Benson*, 285 U. S., 22, 50, 76, L. Ed. 598, 612, 52 S. Ct. 285; *Adkins vs. Childrens Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct., 394, 24, A. L. R. 1237; *People vs. C. Klinck, Packing Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916 D, 1051; *Wichita R. & Light Co. vs. Public Utilities Com.*, 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51; *Southern R. Co. vs. Virginia*, 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148; *Riley vs. Massachusetts*, 232 U. S. 671, 58 L. Ed. 788, 34 S. Ct. 469; *Miller vs. Wilson*, 236 U. S. 373, 59 L. Ed. 628, 35 S. Ct. 342, L. R. A. 1915 F. 829; *Bosley vs. McLaughlin*, 236 U. S. 385, 59 L. Ed. 632, 35 S. Ct. 345; *Holden vs. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383; *Muller vs. Oregon*, 208 U. S. 412, 52 L. Ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; *Bunting vs. Oregon*, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A 1043.

The courts have never sanctioned such unlimited delegation of legislative power as is here claimed. Indeed, at no time have they ever sanctioned any unrestricted delegation of legislative power. In the Flexible Tariff Act cases, the Interstate Commerce Commission cases, the Draw Bridge cases, the Securities and Exchange Commission cases, the Radio Act of 1927 cases, and all other cases cited by the Office of Price Administration, where the

courts have sanctioned delegation of legislative powers, the courts have found that Congress had so prescribed and fixed limits upon the power delegated as to make the agency to which such power was delegated a mere agent in fact of Congress with no discretion other than to carry out what had already been established and determined by the Congress. This policy is defined and so distinguished from the position here assumed by appellants, by Mr. Chief Justice Hughes and Mr. Justice Cardozo in separate but concurring opinions in *Schechter vs. United States*, supra.

Judicial Powers

If the suspension orders being issued by the Office of Price Administration are penalties, which we hope to show they are, then the "Hearing Administrator" and all his "Hearing Commissioners" are sitting as "courts", usurping the Judicial Powers of the United States Government in violation of Article III of the Constitution. The Constitution itself fixed this power in one Supreme Court and in such inferior Courts as Congress might from time to time ordain and establish. The provisions of the Constitution are mandatory. The word *shall* has been used so that there could be no room for doubt. As early as 1816, in *Martin vs. Hunter*, 1 Wheat. 330, 4 L. Ed. 97, the Supreme Court held: "Congress cannot vest any portion of the judicial power of the United States except in Courts ordained and established by itself," and this doctrine has

been enforced by this Court ever since. Indeed, judicial power is not Congress' to delegate. It was vested by the Constitution.

Penalties or Allocations

The Office of Price Administration seeks to justify their system of issuing suspension orders on the grounds that they are a part of the allocation system and not penalties. Judge Atwell in his able opinion in the Court below said they were penalties. (See Opinion, R. 99). The Select Committee, speaking for the House of Representatives, says they are penalties that Congress never intended to be set up or fixed.

In passing upon whether or not the suspension order here under consideration was a penalty, Judge Atwell said:

> "Remedial cases are such as afford summary adjustment through extraordinary writs, such as prohibitions, mandamus, certiorari and quo warranto. State vs. St. Paul, 28 N. W. 245; 7 Words and Phrases, 6075. Punitive is punishment for past wrongdoing, as well as to deter the defendant and others in a similar business from repeating such wrongdoing in the future. Olive vs. Columbia 43 S. E. 207. It is not thought that an order carrying results such as this one can be said to be anything other than a penalty—than punitive. The wages of transgression are the loss of business—the loss of money—the loss of actual property rights. Penalty is defined as a punishment imposed for a violation of a rule or a law.

> A painful consequence or any disadvantage attached to some procedure, as a penalty for carelessness. A disadvantage imposed upon a competitor for an infraction of the rules." (Atwell opinion, supra.)

It has been held that a supposed "tax" to compel compliance with an order is a "penalty". *Carter vs. Carter Coal Co.* 298 U. S. 238, 80 L. Ed. 1160, holding: "It is very clear that the 'Excise Tax' is not imposed for revenue, but exacted as a penalty to compel compliance with the regulatory provisions of the act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion, precisely the same as tho he did so to avoid a term in jail." How similar to the sitaution before us! In the Report of the Select Committee of the House of Represenatives, supra, there are letters and reports from the Office of Price Administration stating, specifically, that the suspension system had been adopted as the most effectual way of "enforcing the law;" "that the suspension procedure had been adopted for this purpose alone."

We are not left in doubt by the Supreme Court as to whether or not transactions of this kind are penalties. It has been held that any punishment imposed to enforce compliance with a law or a rule is a penalty. *United States vs. Constantine*, 296 U. S. 287, ante 233, 56 S. Ct. 223; *United States vs. Butler*, 297 U. S., 1, ante, 477,

56 S. Ct. 312, 102 A. L. R. 914; *Child Labor Tax Case (Bailey vs. Drexel Furniture Co.)* 259 U. S. 20, 66, L. Ed. 818, 42 S. Ct. 449, 21 A. L. R. 1432; *Hill vs. Wallace,* 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453; *U. S. vs. LaFrance,* 282 U. S. 568, 572, 75 L. Ed. 551, 555, 51 S. Ct. 278; *Wallace vs. Cutter,* 298 U. S. 229; *O'Sullivan vs. Felix,* 233 U. S. 318; *Simon Hardware Co. vs. Nelson,* District Court of the District of Columbia, decided September 17th, 1943, and not yet reported.

Petitioners urge that there is no question but that the suspension order issued against them was a penalty in the light of the decisions cited above.

The Office of Price Administration's entire brief in the Court below was devoted to the task of convincing the Courts that the "suspension order" was a part of the system of "allocation" of strategic war materials. By whatever name they call it, in the light of the cases above cited it is still a "penalty". It is still punishment exacted and threatened to force compliance with the orders and regulations promulgated by the Office of Price Administration. They say so themselves. They argue, and point to the letter of the Attorney General, and to other proceedings before the Committee of Congress, considering this bill, that their administrative "penalties" needed additional ones to assist enforcement of compliance with the law and regulations.

The decisions above cited say that by whatever name it is called if its real purpose is to "force compliance" it is

a penalty. This point is particularly stressed in *Carter vs. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

There was nothing in the cases cited by them in substantial conflict with this view.

The Office of Price Administration contended in the Courts below that because we made no attack upon the constitutionality of the Statute itself before a three-judge court we had conceded the regularity of most of their set-up. The course taken was the judgment of counsel. We set out to do no more than was necessary to protect appellees' rights. Had we deemed it necessary so to do, we, in modest disagreement with Judge Atwell's opinion, believe we could have successfully attacked the delegation of the power that was given to the President in most of the instances. Never before has counsel known of so unlimited a delegation. The delegations condemned by the Supreme Court in *Panama Refining Co. vs. Ryan* and *Schechter vs. United States*, supra, were not so flagrant. But we indulged the presumption, as the law demands we should, that Congress had no intention of delegating to anyone power to set up the systems of "tribunals" about which we here complain, because Congress could not have done so had it desired.

Due Process

If Congress did not delegate power to the Office of Price Administration to set up the "Office of Hearing Administration", or if it attempted to do so in violation of either

Articles I or III of the Constitution of the United States, then the suspension order issued against Petitioners is lacking in all the essential elements of due process, and is in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. *Hamilton vs. Kentucky Distillers & Warehouse Co.*, 251 U. S. 146, 156, 64 L. Ed. 194, 199, 40 S. Ct. 106; *Brooks vs. U. S.* 267 U. S. 432, 436, 437, 79 L. Ed. 699-701, 45 S. Ct. 345, 37 A.L.R. 1407; *Nebbia vs. New York*, 291 U. S., 502, 524, 78 L. Ed. 940, 949, 54 S. Ct. 505, 89 A. L. R. 1469.

No emergency can relieve Congress of the provision of Due Process. *Ex parte Milligan*, supra; *Wilson vs. New* 243 U. S., 332, 61 L. Ed. 755, 37 S. Ct. 298, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Home Bldg. & Loan Assn. vs. Blaisdell*, 290 U. S. 397, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481.

The "Office of Hearing Administration" under which the "Hearing Commissioners" function derives its natal status from General Order No. 46. General Order No. 46 derived its legislative birth by the simple fiat of the Administrator of the Office of Price Administration. Ration Order 5C, supra, came into being by the same token. Yet it is the "Supreme Law" governing the millions of American Citizens who deal in or purchase rationed products in the markets of this Nation!

Procedural Regulation No. 4 is their "Judicial Code." Under it they sit in judgment of the acts and conducts of

America's most vital industries. This "Regulation" specifically says that the "judge" will not be bound by the rules of evidence prescribed in our Judicial Code, but will receive "evidence" from any source and in whatever status his "discretion" deems "to the best interest." Very often it is by "hearsay." More often it is evidence of a very high technical nature from its own untrained, unskilled and inefficient employees who could, in no sense of the word, qualify as experts under our system of jurisprudence. As an examble (R. 42-43) a witness was permitted to testify as to the shortage of gasoline in one of Petitioners' stations on the measurement of some one else who told him about it. Miss Bettie K. Wolf (R. 62, et seq.) testified that the "Investigators" of the Office of Price Administration had to call her over the telephone to ascertain how to measure a tank of gasoline. These men were allowed to testify as "experts" and freely give their opinions as to the guilt of Petitioners.

The Administrator of the Office of Price Administration appoints the Hearing Administrator, the Hearing Commissioners, the investigators and the attorneys who prosecute before the "judges." A citizen who has been convicted by one of the "judges" has the glorious privilege of appealing his case to the Hearing Administrator, the boss of the "judge." The Office of Price Administration is, then, the complaining witness, the prosecuting attorney, the "judge" the "appellant court" and, finally, the execu-

tioner, in defiant disregard of the principles of separation of government functions. There is Due Process here. No wonder they so strive to prevent a citizen's redress to the courts!

Congress certainly did not "Ordain and Establish" an inferior court over which these "Hearing Commissioners" were to preside as "judges." The "judges" were not appointed by the President and confirmed by the Senate. They do not hold their office during good behavior. They may not be impeached. They answer only to the Administrator, if to anyone, and the limit of their "judgment" is bounded only by their own consciences. No wonder Judge Atwell called it "a modern example of pure dictatorship."

The questions here presented to the Court are far different from those presented in the Rent Control and Price Fixing cases recently decided. In the first place, the question there before the Court was one of power delegated by Congress. The Court found that there were sufficient standards of limitation placed upon the administrators by the Act to bring these acts within the permitted classes of delegation of legislative power. In this case the question concerns powers that the administrator has delegated unto himself. Ration Order 5c, Procedural Regulation No. 4 and General Order No. 46, supra, prescribe a series of self-delegated authori-

ties which Congress did not contemplate and, under the Rent Control and Price Fixing cases, could not have delegated. The power and procedure set out in these documents constitute an unlimited delegation of both legislation and judicial power, leaving to the "judgment" of the Hearing Commissioner what disposition shall be made of a man and his business who is brought before him. He may, upon his own "judgment", suspend a man's business for the duration of the war and thereby completely destroy the business, and if the regularly constituted courts are not permitted to intervene, then the business and industrial structure of the entire nation will depend upon the "judgment" of a hearing commissioner. Certainly, we can not believe that Congress ever intended to delegate such powers and, if they did, under all the decisions of this Court, including the decisions in the Rent Control and Price Fixing cases, this Court would not permit such delegation.

Under Question 3, Germane to Specification of Error 3

Petitioners earnestly contend that so much of Ration Order 5c as attempts to "legislate a penalty" administratively fixed, and Procedural Regulation No. 4 are in direct violation of Article I of the Constitution of the United States, and that the Office of Hearing Administration set up under General Order No. 46 is violative of Article III of the Constitution of the United States, as

well, and that any penalty enforced under such suspension orders issued by the Office of Hearing Administration would be in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. They in no way compromise or yield from this position. Yet they urge, even if this Honorable Court holds against them on these questions, the judgment of the United States Circuit Court of Appeals in this cause must be reversed and that of the trial court sustained under *Hecht Company vs. Chester Bowles*, 88 L. Ed. 465.

Had Petitioners chosen to disregard the suspension order issued by the Office of Price Administration, then the only way its provisions could have been enforced would have been by injunction proceeding brought by the Office of Price Administration in the District Court of the United States for the Northern District of Texas. Then, certainly, the rule laid down in *Hecht vs. Bowles*, supra, would have been directly in point. That your Petitioners sought relief from such court prior to the enforcement of such suspension order can not alter the principles of equity involved. The deduction naturally follows that since the trial court granted the injunction against the suspension order, he certainly would not have judicially enforced it had the Office of Price Administration brought such proceeding. It is significant that neither in their pleadings nor in any other manner, did the Office of Price Administration attack the jurisdiction of the court. On the contrary, by

filing the joint and several answer of defendants (R. 10-13), the jurisdiction of the court was conceded. Equally significant are the allegations contained in sub-paragraphs 3 and 4 of Paragraph 10 (R. 25, 26) of Petitioners' supplemental petition in answer to the answers of the defendants, in which the pleading is amply sufficient to have supported the judgment of the court under *Hecht vs. Bowles*, supra, whether or not such orders and directives of the Office of Price Administration above complained of are in violation of the provisions of the Constitution pleaded.

The penalty assessed was one for a past violation. There is no evidence, nor is there any contention on the part of the Office of Price Administration, that the violation for which the suspension order was issued was a continuing one. On the contrary, the evidence showed and the trial court so found (R. 101) that the violation, if any, was an isolated one and even that not a wilful violation. There is no contention on the part of the Office of Price Administration that the trial court abused its discretion, neither is there any evidence or lack of evidence in the record that would sustain such a proposition, even had it been pleaded. Therefore, under *Hecht vs. Bowles*, supra, the granting of this injunction was purely discretionary with the trial court, even if Petitioners' contention as to the constitutionality of the Office of Price Administra-

tion's procedure is not sustained by this Honorable Court. Neither is there anything in *U. S. vs. Morgan*, 307 U. S. 191, 83 L. Ed. 1217, 59 S. Ct. 795, contrary to this view.

Respectfully submitted,

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